(3)

No. 99-420

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

MIDWEST MOTOR EXPRESS, INC.,
MME, INC., MIDNITE EXPRESS, INC.,
and EXPRESS CARTAGE, INC.,
Petitioners,

v.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners, Midwest Motor Express, Inc., MME, Inc., Midnite Express, Inc., and Express Cartage, Inc. (collectively referred to hereafter as "Midwest") submit this Reply to address the matters asserted in the Brief in Opposition to Midwest's Petition for Certaiorari filed by Respondent Central States Southeast and Southwest Areas Pension Fund ("Central States").

I. THIS COURT'S DECISION IN *BAY AREA* PRECLUDES JURISDICTION IN THIS CASE.

A. Central States Admits It Filed This Action Prematurely.

In its initial petition, Midwest demonstrated that Congress, in ERISA, established strict procedural notice and demand of payment rules, with which a plan must comply

as a jurisdictional prerequisite for bringing a lawsuit. 29 U.S.C. § 1382. Those rules were clearly articulated by this Court in *Bay Area*. Petition for Certiorari at p. 10.

Central States admitted that it filed this action before Midwest's first withdrawal liability payment was due. Brief in Opposition at p. 12. However, Central States now seeks to create an elaborate and ingenious way to circumvent ERISA and *Bay Area*. It argues that by filing an admittedly "premature" complaint, which seeks declaratory relief, and anticipates an employer's refusal to pay, Central States can create a justiciable case or controversy giving jurisdiction to the court. Then, if the plan guesses correctly about the employer's response, it can file a second amended complaint, based on facts occurring after the filing of the initial complaint, to perfect the premature lawsuit.

This torturous process runs afoul of both ERISA and *Bay Area*. ERISA does not contemplate or allow "anticipatory" complaints. It sets forth simple procedural due process rules, requiring the plan to submit a written notice of demand for payment, allowing the employer 90 days to respond. 29 U.S.C. § 1399(b). It's purpose is twofold: (1) to provide a fair opportunity for the employer to evaluate and respond and (2) to promote judicial economy by avoiding a premature lawsuit which may be unnecessary, may be settled, or may have to be amended depending on the facts and employer's response. Central States' conduct, in fact, created additional litigation.

The Federal Declaratory Judgment Act, 28 U.S.C. § 2201, does not confer jurisdiction, as Central States suggests, but rather provides an additional remedy for a court which has proper subject matter jurisdiction. *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983). Central States had no right to sue Midwest when it filed its complaint, the court lacked jurisdic-

tion, and seeking declaratory relief under section 2201 does not cure this lack of jurisdiction.

This Court's recent decision in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California, Inc.*, 552 U.S. 192 (1997) emphatically held that a fund's interest in receiving withdrawal liability payments does not ripen into a cause of action triggering the limitations period until after the employer defaults on an installment due and payable under the plan's schedule. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. Of California,* 552 U.S. 192, 202 (1997). Only when an employer has violated a duty to a plan under MPPAA may the plan sue the employer: "[u]ntil the employer fails to honor its obligation, the plan cannot sue." *Id.* This Court should grant review not only to clarify a jurisdictional mistake but to prevent additional courts from circumventing its *Bay Area* holding by allowing anticipatory complaints for declaratory relief.[1]

B. The Relation Back Doctrine Does Not Save Central States' Complaint.

Recognizing the weakness in its theory that an "anticipatory" complaint seeking declaratory relief can create jurisdiction that otherwise does not exist, Central States argues that 28 U.S.C. § 1653 supports its position. It does not. Section 1653 allows a party to cure defective allegations of jurisdiction; it may not be used to create jurisdiction retroactively where it did not previously exist. *Aetna Cas. & Sur. Co. v. Hillman,* 796 F.2d 770 (5th

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1 Moreover, Midwest did not sue Central States in North Dakota until May 1994, App. pp. 5a and 56a, after Midwest's first interim payment was due on May 1, 1994. Reply Appendix at 6a (hereinafter referred to as "R. App. at ——"). Central States' contention that Midwest filed its action prior to the due date of its first payment is incorrect. Thus, Central States' reliance upon Midwest's filing as establishing a justiciable case or controversy between the parties prior to the first payment is also misplaced. Brief in Opposition at p. 12.

Cir. 1986). *See also, Advani Enterprises, Inc. v. Underwriters at Lloyds,* 140 F.3d 157 (2nd Cir. 1998).

Importantly, Rule 15(c) of the Federal Rules of Civil Procedure embodies this same principle. By allowing the second amended complaint to "relate back" to the time of filing its initial complaint, it seeks to prevent the statute of limitations from time-barring meritorious allegations, provided the court had subject matter jurisdiction in the first place. Rule 15(c) does not allow a party to create jurisdiction when subsequent events occur.

> Whether a cause of action has accrued is determined according to the facts existing at the time the action was commenced. Where an action has been commenced before the alleged cause of action has accrued, the subsequent occurrence of conditions or facts necessary to make the cause of action complete will not avail the plaintiff in maintaining his suit.

1 Am. Jur. 2d *Action* § 71.

In light of the elementary principle that facts that occur after the filing of a complaint cannot serve to create a claim that does not exist at the time of filing, it is clear that Central States did not assert a federal question at the time it initially filed its complaint. There was no jurisdiction when the complaint was filed, and the later amendment to allege facts that occurred after the filing does not change that fact.

II. MIDWEST'S WITHDRAWAL FROM CENTRAL STATES WAS INVOLUNTARY CONTRARY TO CENTRAL STATES' FACTUAL MISREPRESENTATION REGARDING THE DATE AND CAUSE OF MIDWEST'S WITHDRAWAL.

On page 3 of Central States' Brief in Opposition, Central States identifies early August 1991 as the time that Midwest tendered a bargaining proposal calling for withdrawal from Central States and further identifies

August 12, 1991 (the date the union's strike began) as the date on which Midwest permanently ceased to have an obligation to contribute. By this identification, Central States implies the existence of the type of employer conduct detrimental to plan participants in Justice O'Connor's analysis in *Connolly v. PBGC*, 475 U.S. 211, 229 (1986) (O'Connor, J. concurring) and *Concrete Pipe v. Construction Laborers Pension Trust Fund*, 508 U.S. 602, 647 (1993) (O'Connor, J. concurring). Brief in Opposition at p. 3. Central States cited the arbitrator's decision in support of that factual statement, App. p. 54a, leaving the impression that Midwest's bargaining offer had created the withdrawal. This is incorrect. On the next page of the arbitration decision, the arbitrator noted that in May 1992, the parties had reached agreement regarding a package of wage and benefits concessions "which would have kept Midwest in the [Central States] Fund." App. 55a. What is implicit in the arbitrator's decision, although ignored by Central States, is what happened between those two dates: the tendering of a bargaining proposal by Midwest requiring its continued participation in Central States. Therefore, Midwest did not have a permanent cessation of its obligation to contribute to Central States until Midwest's employees voted to decertify the International Brotherhood of Teamsters on April 15, 1994. App. 22a. Contrary to Central States' misrepresentation, the arbitrator found that Midwest's withdrawal was involuntary. App. 66a. Moreover, the district court found that Midwest did not participate in the employees' decertification decision. App. 22a. Therefore, under the analysis of Justice O'Connor's concurrence in *Connolly* and *Concrete Pipe* there was no employer conduct regarding the withdrawal. Petition at p. 20-21.

III. THERE IS RETROACTIVE WITHDRAWAL LIABILITY IN THIS CASE.

Central States principally contends that Midwest had not established its amount of pre-Employee Retirement Income Security Act of 1974 ("ERISA"), liability and, therefore, that Midwest failed to quantify any portion of the withdrawal liability assessment that had an unconstitutional retroactive impact upon it. Brief in Opposition at pp. 6, 7, 10, 11, 14, 15, 18, 19.

There is retroactive withdrawal liability in this case because the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") first established the concept of withdrawal liability. 29 U.S.C. § 1381, ("Withdrawal liability established; criteria and definitions.") Pre-MPPAA liability with respect to a multiemployer pension plan such as Central States was limited to two instances, in both of which the multiemployer plan was terminated. First, under 29 U.S.C. § 1363, there was liability for a substantial employer (an employer that contributed 10 percent or more of all plan contributions) for withdrawal, limited by the requirement that the plan itself terminate within five years. 29 U.S.C. § 1363(c)(2). Second, under 29 U.S.C. § 1364, ERISA provided for the liability of all contributing employers that withdrew from the plan within the last five years before a termination of the plan. Neither pre-MPPAA circumstance would have applied to Midwest, because Midwest was not a substantial employer and because the Central States Fund has not terminated. Thus, but for MPPAA, enacted September 26, 1980, Midwest would not be subject to any liability.

Moreover, the court of appeals below acknowledged that:

> the MPPAA has a retroactive aspect, since withdrawal liability imposes on the withdrawing employer a share of the unfunded vested liability pro-

> portionate to the employer's share of contributions to the plan during the years of its participation, *Concrete Pipe*, 508 U.S. at 610, even if the years of its participation in the plan preceded the effective date of the MPPAA or the enactment of ERISA itself.

App. 4a. Thereafter, the court of appeals correctly noted that:

> on April 26, 1994, Central States issued an assessment of withdrawal liability and a demand for payment in the amount of $2,546,439.39, listing Midwest's 'pre-1980 Pool Liability' as $1,814,856.36 and its 'post 1979 Pool Liability' as $731,582.94. The 'pre-1980 Pool Liability' is the retroactive withdrawal liability imposed by the MPPAA, effective from 1980, the year specified in the amendment.

App. 5a. It is clear that retroactive liability exists in this case.

IV. MIDWEST HAD NO CONTROL OVER THE LEVEL OF BENEFITS OR ANY OTHER FACTOR THAT MAY PRODUCE UNFUNDED VESTED BENEFITS FOR CENTRAL STATES.

As described by Central States, the arbitrator, and the courts below, Midwest has been deemed to have exercised some control over the level of benefits and contributions that lead to the creation of unfunded vested benefits based on the decisions of management-appointed trustees on the board of trustees that governs Central States.

First, there are indeed management-appointed trustees on Central States' Board of Trustees, but by this Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), that presence cannot be used to infer control, or even influence, of their actions by the party that appointed the trustees. As the Court stated in *Amax Coal*, the duty of a management-appointed trustee is "directly antithetical" to that of an agent of the appointing party. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 341-2 (1981).

As a matter of law, therefore, Midwest could not have been deemed to have any control over any decision by the trustees of Central States.

With respect to Central States' claims that Midwest controlled the contribution levels, Brief in Opposition at 4, the district court found that:

> The Trustees determine the level of benefits paid to participants and beneficiaries. Actuaries [of the Plan] advise the Trustees on appropriate benefit levels in light of the Plan's assets and income. The actuaries also determine the level of contributions necessary to support the benefits disbursed.

App. 2a. The district court found that plan actuaries determine the level of contributions based on an admission by Central States. In the arbitration proceedings a Central States witness admitted that, in the course of negotiation of the National Master Freight Agreements, to which Midwest was a signatory at all times, both union and employer negotiators, when discussing pension benefit increases, would ask plan actuaries to determine the level of contributions necessary to support those benefit levels. R. App. at 7a-8a. Thus, the district court made its finding that plan actuaries determine the level of pension contributions based on an admission by Central States.

The only factor that creates plan underfunding is the determination of the level of pension benefits by plan trustees. As noted by the Seventh Circuit, the critical element that creates plan underfunding is the establishment of the level of pension benefits:

> The plan trustees (appointed equally by the employers and the union) determine the level of benefits acording to actuarial assessments of the plan's value and future performance. When these assessments are too conservative, the plan ends up with a surplus that can be applied to future benefits. When the assessments are too optimistic, unfunded benefits result.

App. 11a. This is solely a responsibility of the Trustees and in no way can be attributable to Midwest.

Simply put, because Midwest had no control over the trustees, the level of pension benefits, or the level of contributions, Midwest had no control over any factor that produces underfunding for Central States and falls squarely within Justice O'Connor's concerns in *Connolly* and *Concrete Pipe*. In this context, ratification of trustee actions in bargaining agreements under pain of strikes and payment of withdrawal liability do not evidence control, but rather its exact opposite.

V. MPPAA'S RETROACTIVE LIABILITY IS AN UNCONSTITUTIONAL EX POST FACTO ENACTMENT.

Contrary to Central States' argument that this is not an appropriate case to deem the *Ex Post Facto* Clause worthy of review because that issue was not litigated below, this issue became ripe for consideration by this Court when the court of appeals found that Midwest's challenge under the Takings Clause failed under the traditional test. App. at p. 15a. In his concurrence in *Eastern Enterprises v. Apfel,* Justice Thomas said that he would be willing to re-consider the restrictive application of the *Ex Post Facto* Clause of the Constitution by *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798) to criminal cases only when a retroactive civil law passes muster under current Takings Clause jurisprudence. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 2154 (1998). This case met Justice Thomas's standard on the date of the decision by the appellate court, but not before.[2]

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[2] Midwest notes that *Eastern Enterprises* was decided on June 25, 1998, after the arbitration and district court decisions. Further, this Court's decision in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959) does not stand for the proposition that the *Ex Post Facto* Clause is not worthy of review in this case because that issue was not litigated in the courts below as claimed by Central States. ***The Monrosa*** **stands for the proposition that the**

This case should also meet this Court's discretionary standard of deciding questions of public importance within the context of meaningful litigation. There are only two precedential questions to this issue that should be answered prior to granting certiorari to review this question. First, is there retroactivity in a civil statute in this case? Second, did the court below hold that Midwest's challenge under the Takings Clause failed? Since the answer in both cases is yes, this question is ripe for review by this Court.

CONCLUSION

This case presents issues important to American jurisprudence. For this reason, as well as the reasons set forth above and in the Petition, the Court should issue a writ of *certiorari*.

Respectfully submitted,

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Supreme Court will not grant review when the issue is not of sufficient public importance, or when the facts are not justiciable, or if the parties have not had an opportunity to brief the issue before oral argument before this Court. Midwest can satisfy each of those elements on the *Ex Post Facto* issue in this case.

APPENDICES

APPENDIX A

Central States' Notice and Demand for Payment of Withdrawal Liability From Midwest

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CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND
9377 W Higgins Rd
Rosemont IL 60018-4938

April 26, 1994

VIA CERTIFIED MAIL
RETURN RECEIPT # P 840 228 594
AND EXPRESS MAIL

Midwest Motor Express, Inc.
5015 Main Avenue, East
Bismarck, ND 58501

RE: NOTICE AND DEMAND FOR PAYMENT OF
WITHDRAWAL LIABILITY
MME, INC.
MIDWEST MOTOR EXPRESS, INC.
ASSESSMENT NO.: 4913053-WL940139-01

Gentlemen:

This is a demand for payment of withdrawal liability incurred as a result of a permanent cessation of contributions to Central States, Southeast and Southwest Areas Pension Fund (the "Fund") by the above captioned business on behalf of some, or all, of its bargaining unit employees. This demand is made pursuant to Section 4219 of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1399(b)), and applies equally to all members of any controlled group of trades or businesses, as defined in Section 414(c) of the Internal Revenue Code, of which the above captioned business is a member.

The total amount of such withdrawal liabiilty is $2,546,-439.30.

Please make your check payable to Central States, Southeast and Southwest Areas Pension Fund and forward it to the address as follows:

CENTRAL STATES WITHDRAWAL LIABILITY
P. O. Box 71262
Chicago, Illinois 60694

Please write the assessment number on your check.

At your option, the withdrawal liability may be amortized and paid in monthly installments according to the enclosed minimum required payment schedule, or such liability may be paid in a lump sum. No penalty, interest or amortization charges will be applied if payment of the entire withdrawal liability is received by this office on or before June 1, 1994. If you choose the monthly installment option, amortization charges will accrue on the outstanding balance at the annual rates indicated on the enclosed minimum required payment schedule.

Subject to applicable regulations, if any payment of withdrawal liability is not made when due and such payment plus delinquency charges is not made within sixty (60) days after receiving written notice from the Fund of such delinquency, the Fund may require immediate payment of the remaining balance of the withdrawal liability plus delinquency charges accrued from the due date of the first payment which was not timely made.

Enclosed herewith are documents as follows:

1. A copy of the withdrawal liability calculation;
2. A copy of the minimum required payment schedule for the monthly installment option;

3. A copy of the Fund's procedure governing review of any items relating to the determination and calculation of withdrawal liability, the minimum required payment schedule, and the resolution of disputes regarding withdrawal liability.

Sincerely,

/s/ Harry E. Keil
HARRY E. KEIL
Manager, Delinquent Accounts

HEK:SMT:cc-mm
Enclosures

cc: Withdrawal File

Please Note: For inquiries relating to the calculation of this assessment contact Gina Alvarez on extension 3097.

For all other inquiries contact Susan M. Tebbens on extension 3608.

Controlling Employer: MME, Inc.
Assessment No.: 4913053-WL940139-01

Withdrawn Company: Midwest Motor Express, Inc.
Address:

Type of Calculation: 1991 Complete Withdrawal

Date Prepared: 21-Apr-94

Section I—Pre-1980 Pool

a. Net Employer Contributions (1975-1979)

Year	Contributions	# CBUs
1975	$305,622.50	0.0
1976	$407,913.00	0.0
1977	$485,889.00	0.0
1978	$567,484.00	0.0
1979	$773,254.00	0.0
Total	$2,540,162.50	0.0

b. Net Contributions All Employers (1975-1979) $1,993,217,854

c. Allocation Fraction 0.0012744028

d. Unamortized 12/31/79 UVB $1,424,083,736

e. Pre-1980 Pool Liability $1,814,856.36

Section II—Post-1979 Pool

a. Net Employer Contributions (Last 10 Years)

Year	Contributions	# CBUs
1981	$846,011.00	17,025.0
1982	$710,957.00	13,229.0
1983	$830,696.00	15,109.0
1984	$755,717.00	13,744.0
1985	$784,087.00	12,552.0
1986	$733,677.00	10,800.0
1987	$719,843.00	10,005.0
1988	$691,056.00	9,476.0
1989	$652,151.00	8,942.0
1990	$583,199.00	7,995.0
Total	$7,307,394.00	

b. Net Contributions All Employers Last 10 Years $6,092.989,201

c. Allocation Fraction 0.0011993118

d. Net Change in UVB $610,002,272

e. Post-1979 Pool Liability $731,582.94

Section III—Adjustments to Liability

a. Unadjusted Liability $2,546,439.30

b. De Minimis Rule $0.00

c. Prior Assessment Credit $0.00

d. Partial Prorate $0.00

e. Sec. 4225 Limitation $0.00

f. Adjusted Liability $2,546.439.30

Section IV—Partial Prorate

a. # CBUs in Next Year 0.0

b. 5 Year Average # CBUs

Year	# CBUs
1986	10,800.0
1987	10,005.0
1988	9,476.0
1989	8,942.0
1990	7,995.0
Total	47,218.0

5 Year Average 9,443.6

c. Prorate Fraction 1.0000000000

d. Remaining Liability $2,546,439.30

e. Partial Prorate $0.00

Payment Schedule

a. High Contribution Rate (Weekly Rate Basis) $73.00

b. 3 Year Average # CBUs

Year	# CBUs
1981	17,025.0
1982	13,229.0
1983	15,109.0
Total	45,363.0

3 Year Average 15,121.0

c. Partial Prorate Fraction 1.0000000000

d. Annual Payment $1,103,833.00

e. Assessment $2,546,439.30

f. Amortization Period

Year	Rate	Interest	Opening Bal.	Closing Bal.
1	8.00%	$203,715.14	$2,750,154.44	$1,646,321.44
2	8.00%	$131,705.72	$1,778,027.16	$674,194.16
3	8.00%	$53,935.53	$728,129.69	$0.00
4	8.00%	$0.00	$0.00	$0.00
5	8.00%	$0.00	$0.00	$0.00
6	8.00%	$0.00	$0.00	$0.00
7	8.00%	$0.00	$0.00	$0.00
8	8.00%	$0.00	$0.00	$0.00
9	8.00%	$0.00	$0.00	$0.00
10	8.00%	$0.00	$0.00	$0.00
11	8.00%	$0.00	$0.00	$0.00

g. Monthly Payment Amount $97,576.65

h. No. of Monthly Payments 31.92

i. First Payment Due Date 01-May-94

APPENDIX B

**Excerpt from Transcript of Proceedings
Before the American Arbitration Association
Dated January 14, 1997**

* * * *

[74] Q. [By Mr. Condon, attorney for Central States] Are you generally familiar—going back to the mid-1980 period when you became director of benefits, are you generally familiar with the manner in which the negotiators of the National Master Freight Agreement have communicated with Central [75] States with regard to any proposed changes in the pension articles of that contract?

A. [By Mr. Nelson Central States Director of Benefits] The—I'm more familiar with say the '94 and the '91, less familiar with '88 and '85 because I had less direct involvement.

Generally speaking, the union side would be typically the first ones to contact the fund—and by the fund, it would either be myself or the executive director, Ron Kubalanza—with some concept as to benefit improvements they would want in negotiations. We would try to crystallize these and work with our actuaries to determine and translate those into a contribution rate.

At the same time, the employer trustees would contact us and determine what—in some kind of time frames—dollar package they were looking to put on the table. And by dollars, it's typically wages, health and welfare, and pension all combined. And we would look to work within those time frames, between wages—or those dollar frameworks to determine benefit needs balanced with dollar needs from the contributions.

We'd also within that work with the timing of the benefit implementation, what benefits may be [76] available immediately versus three years down the road or something like that, to try to get the dollars available and the benefit—perceived benefit wants to match.

In some cases, for example, the '85 agreement, we maybe even suggested the 30-and-out benefit. That's the first time that one appeared. Our actuaries said that that was something they saw in the future, and they put that out on the table. It did not come as a suggestion from the union necessarily, but it was something that we suggested as they might make it as attractive, and then we worked with the pricing on that.

* * * *